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### You Have the Right to Remain Silent: Does the U.S. Constitution Require Public Affirmation of Same-Sex Marriage?

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# “You Have the Right to Remain Silent”: Does the U.S. Constitution Require Public Affirmation of Same-Sex Marriage?

*Robert A. Destro*<sup>\*</sup>

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## I. INTRODUCTION

The political and legal campaign for marriage equality rests on the proposition that the Constitution of the United States requires communal recognition of committed, same-sex relationships. The text, structure, and history of the amended Constitution, however, support precisely the opposite conclusion: i.e., that neither the United States nor any state may compel any community, association, or individual to affirm (by word, deed, or policy) the hotly disputed propositions about human sexuality that lie at the core of the debate. Nor can it plausibly be argued that any part of the Constitution requires any person, association, or polity to remain discreetly silent while progressive<sup>1</sup> and LGBT positions on human sexuality become

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1. The term “progressive” is used here in the sense used in JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

To come right to the point, the cleavages at the heart of the contemporary culture war are created by what I would like to call *the impulse toward orthodoxy* and *the impulse toward progressivism*. The terms are imperfect, but each aspires to describe in shorthand a particular locus and source of moral truth, the fundamental (though perhaps subconscious) moral allegiances of the actors involved in the culture war as well as their cultural and political dispositions. Though the terms “orthodox” and “progressive” may be familiar to many, they have a particular meaning here that requires some elaboration.

... I prefer to use the terms orthodox and progressive as *formal properties* of a belief system or world view. What is common to all three [Jewish, Catholic, and Protestant] approaches to *orthodoxy*, for example (and what makes orthodoxy more of a formal property), is *the commitment on the part of adherents to an external, definable, and transcendent authority*. Such objective and transcendent authority defines, at least in the abstract, a consistent, unchangeable measure of value, purpose, goodness, and identity, both personal and collective. . . .

Within cultural progressivism, by contrast, moral authority tends to be defined by the spirit of the modern age, a spirit of rationalism and subjectivism. Progressivist moral ideals tend, that is, to derive from and embody (through rarely exhaust) that spirit. From this standpoint, truth tends to be viewed as a process, as a reality that is ever unfolding. . . . In other words, what all *progressivist* world views share in common is *the tendency to resymbolize historic faiths according to the prevailing assumptions of contemporary life*.

... [P]ublic opinion surveys show that a decided majority of secularists are drawn toward the progressivist impulse in American culture. For these people religious tradition has no binding address, no opinion-shaping influence. Some secularists, however, (particularly many secular conservative and neo-conservative intellectuals) are drawn toward the orthodox impulse.

*Id.* at 43–45 (footnotes omitted); see BRIAN FITZPATRICK, *CULTURE & MEDIA INST., NATIONAL CULTURAL VALUES SURVEY: AMERICA: A NATION IN MORAL AND SPIRITUAL CONFUSION* (2006), <http://nassaucivic.com/NationalCulturalValues.pdf>.

the new orthodoxy in public policy, lest dissent—openly expressed by word or deed—be taken as conclusive evidence of intolerance, lack of social sophistication, “homophobia,” or actionable hostility.

Part II explains how the same-sex-marriage debate is about far more than “achieving equality in some of the most basic elements of civic life, such as bereavement leave, health care benefits, pensions benefits, spousal support, name changes[,] and adoption.”<sup>2</sup> The case law and commentary confirm that legal recognition of same-sex relationships as marriages is a key strategic objective in a much more ambitious and longer-term philosophical and political effort to deconstruct and eliminate the “hetero-normativity” and “hetero-patriarchy” of cultures rooted in the Judeo-Christian and Islamic religious traditions. In their place, advocates hope to build legal and social cultures in which sexual identity is viewed as a social construct, and the law is built around a regime of “intimate pluralism,” in which same-sex and alternative relationships command the same respect and moral status as monogamous, conjugal marriages.<sup>3</sup>

Part III focuses on the two main arguments of advocates for legal recognition of same-sex marriage. The first argument is the analogy to race discrimination. This narrative asserts that the law should deal with sexual orientation in precisely the same way as race; that is, as an

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NCVS reveals that almost all the survey respondents, who are demographically representative of American adults as a whole, can be categorized in one of three values groups—Orthodox, Progressive, and Independent—and these demarcations are based on their views on the role of religion in everyday life.

FITZPATRICK, *supra* exec. summary, at 1.

The Progressives, [seventeen] percent of the public, advocate a secularized approach to private and public life. They reject the notion that having deep religious beliefs is necessary for living a good and moral life. Progressives believe people should live their lives according to their own personal principles, even if those principles contradict God’s teachings. They see morality in shades of gray: morality is situational, not absolute. They tend to think of themselves as the final authority, rather than God or the law. Progressives think government should not be allowed to apply religious principles. [Fifty-three] percent of Progressives say they believe in God, and [thirty-three] percent—four times the overall national figure of [eight] percent—say they do not believe in God.

*Id.* at 2 (emphasis omitted).

2. Halpern v. Canada (Att’y Gen.) (2003), 65 O.R. 3d 161, 168 (Can. Ont. C.A.).

3. The concept of “intimate pluralism” refers to “a constitutional order in which the Due Process Clause protects not only marriage, but also nonmarital sexual intimacy which ‘can be but one element in a personal bond that is more enduring,’ but not within marriage.” Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1374 (2010) (footnote omitted) (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

inherently irrational and immoral basis for differentiating conjugal marriage from other sexual relationships. The second is a time-worn, but potent, argument that religious beliefs about human sexuality are nonrational and are, therefore, illegitimate sources for the construction of social norms. Employed in tandem, these two arguments convey a powerful, albeit implicit, message that cultural norms built on the moral frameworks of the Abrahamic religions are inconsistent with modern concepts of human dignity.<sup>4</sup>

Deconstructing those moral frameworks, however, requires more than a powerful message. The politics of California's Proposition 8 is a case in point: A sustained effort to deconstruct those moral frameworks on a national basis will require the coercive power, moral authority, and legal resources of the federal government.

Obtaining those resources requires two preliminary steps. The first step is a judicial decree holding that sexual orientation is an inherently suspect classification. By equating sexual orientation with race, such a development would confer a highly symbolic, *moral* status on the effort. It would also justify the aggressive use of all of the enforcement powers of the modern administrative state in an effort similar to the effort to extirpate the nation's legacy of racial discrimination. Dissenting individuals and culture-forming institutions would then be forced to make a Hobson's choice<sup>5</sup>: Either provide symbolic affirmation of same-sex relationships or accept fines, penalties, or exclusion from full participation in the civic life of the community.

The second step is a Supreme Court decision that implies that "intimate pluralism" is the only view of human sexuality that passes constitutional muster under the First Amendment. Such a holding would "constitutionalize" the progressive position and provide a useful tool to ensure that contrary views are marginalized or excluded from public space.<sup>6</sup>

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4. See, e.g., *id.* ("The question at the heart of this appeal is whether excluding same-sex couples from another of the most basic elements of civic life—marriage—infringes human dignity and violates the Canadian Constitution.").

5. *Hobson's choice*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/hobson's%20choice> (last visited May 3, 2013) (defining Hobson's choice as "the necessity of accepting one of two or more equally objectionable alternatives").

6. See, e.g., *Nampa Classical Acad. v. Goesling*, 447 F. App'x 776 (9th Cir. 2011) (upholding a state policy that excluded primary religious texts, such as the Bible, the Qur'an, The Book of Mormon, the Hadith, and the Bhagavad Gita from a public charter school's curriculum).

Part IV discusses the contradictions that lie at the heart of the argument that the United States Constitution compels communities to confer equal status on same-sex or alternative, intimate relationships. It argues that protection for diversity was as much the object of the religious-freedom guarantee<sup>7</sup> as it was the purpose of the Civil War and later political-equality amendments. A community's decision to confer or withhold a privileged status is not mere taxonomy but rather the expression of a value judgment. The Equal Protection Clause does not authorize the judiciary to substitute its own value judgments for those of Congress and the People of the states unless the Constitution itself confers the contested status.

This Article concludes by arguing that the federal government has no authority to deconstruct the moral culture of any community. The Constitution expressly prohibits any attempt to require an individual or institutional dissenter to affirm, expressly or implicitly, abhorrent moral or religious views or behaviors.

## II. THE POLITICS OF COMPELLED AFFIRMATION IN THE MARRIAGE DEBATE

A cursory review of the literature on same-sex marriage confirms that the debate over legal recognition is about far more than just marriage equality. It is "inextricably and famously intertwined with a parallel set of social and political debates about sexual politics and the meaning of marriage"<sup>8</sup> that center on the perceived need to recognize *and validate* alternative relationships. Writing in a recent issue of the *Georgetown Law Journal*, Matthew S. Nosanchuck put it this way:

Ultimately, there is ample room in this discourse for developing or recognizing alternative forms of relationship recognition to marriage. Marriage, however, now consistently overshadows all other forms of relationship recognition and has essentially rendered them

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7. The religious-liberty guarantee is a concept that includes not only the Religion Clause of the First Amendment but also the No Religious Test Clause of Article VI, the Qualifications Clauses for Senators, Members of Congress, and the President; the Free Speech, Free Press, Peaceable Assembly, and Petition Clauses of the First Amendment; and Sections 1 and 5 of the Fourteenth Amendment. For an extended discussion of the concept, see Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355 (1995); see also Robert A. Destro, *By What Right?: The Sources and Limits of Federal Court and Congressional Jurisdiction over Matters "Touching Religion,"* 29 IND. L. REV. 1 (1995).

8. Dubler, *supra* note 3, at 1349.

as suboptimal options on the menu. Marriage has become the mainstay, and while LGBT advocates would not necessarily reject these other forms of relationship recognition, *a consensus has evolved within the LGBT, progressive, and civil-libertarian communities around marriage equality as the ultimate objective and the measure of full support for LGBT civil rights.* . . .

Indeed, the debate over marriage equality has come to be less about the bundle of specific legal rights and obligations that accompany marriage *and much more about the symbolic importance of marriage and the values that underlie support for marriage equality.*<sup>9</sup>

If symbolic affirmation of the equal moral status of same-sex and alternative intimate relationships is the ultimate goal, we must now turn to examine the propositions that citizens and associations will be expected to affirm to demonstrate their “measure of full support for LGBT civil rights.”<sup>10</sup>

*A. The Dispute over the Nature of Human Sexuality: Is it a Social Construct, a Function of Biology, or Both?*

At the heart of the debate over the legal status of same-sex unions<sup>11</sup> lies an extended and unresolved argument about the nature, purpose, and meaning of human sexuality. Even a cursory review of the now-voluminous literature on the topic demonstrates that the debate over same-sex marriage is a proxy for profoundly *political* disagreements over basic biological, social, moral, and cultural *categories*.

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9. Mathew S. Nosanchuk, *Response: No Substitutions, Please*, 100 GEO. L.J. 1989, 2007–08 (2012) (emphasis added).

10. *Id.* The acronym LGBT—Lesbian, Gay, Bisexual, and Transgender—is used here as shorthand to describe a collection of groups within a community that describes itself, variously, as gay, lesbian, bisexual, transgendered, transsexual, queer, and questioning (GLBTQTQ). For purposes of this Article, I have adopted the term used generally in the literature. “Transgender is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth.” AM. PSYCHOLOGICAL ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION (2011), <http://bit.ly/apa-trans> (emphasis omitted).

11. For purposes of this discussion, the term “same-sex union” refers to a union on which the state has conferred the status of marriage, or to any other union of two persons of the same sex that presumes a sexual relationship, such as a “civil union,” and on which the state has conferred a status that is the functional equivalent of marriage.

*1. Affirming the proposition that human sexual preference and gender are social constructs*

The argument for marriage equality rests on the proposition that sexual preference and gender are socially constructed—"that is, as powerfully shaped by social and cultural forces in addition to biological and psychological factors."<sup>12</sup> This perspective views

both sexuality and gender not as something that people "are," but something that they "do"—that is, that they accomplish in social interaction. Individuals develop identities as sexual beings by (more or less consciously) continuously assessing their desires, adopting (or rejecting) particular attitudes, and engaging in (and revising) various practices. Likewise, they become gendered through ongoing experiments with gender rules—conforming to some, breaking others—assessing others' reactions, and adapting their gender performances accordingly.

Although analytically distinct, sexuality and gender are intimately interrelated, mutually constructed in distinctive ways in specific social and historical locations.<sup>13</sup>

A review of the commentary on the marriage debate *within* the LGBT community has "long demonstrated [that] an intersecting set of legal and social arguments makes it nearly impossible to characterize the politics of advocating for a more capacious right to marry."<sup>14</sup> For some, "[a]ccess to marriage is . . . about equal access to a powerful legal institution that grants both numerous concrete rights, as well as myriad forms of social privilege."<sup>15</sup> For others, marriage is "an institution with a venerable pedigree of exclusion and hierarchy"<sup>16</sup> that stigmatizes "those who do not wish to order their intimate lives within marriage's normative structures."<sup>17</sup> The common thread, however,

12. Laura M. Carpenter, *Like a Virgin . . . Again?: Secondary Virginity as an Ongoing Gendered Social Construction*, 15 *SEXUALITY & CULTURE* 115, 118 (2011).

13. *Id.* (footnotes omitted) (citations omitted).

14. Dubler, *supra* note 3, at 1349.

15. *Id.* at 1349 & n.2 (citing sources).

16. *Id.* at 1349 & n.3 (citing sources). In this view, the status of marriage grants legitimacy to some relationships and necessarily marginalizes others. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81–82 (1999).

17. Dubler, *supra* note 3, at 1350. For a succinct statement of this position, see, for example, Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 *VA. L. REV.* 1535, 1549 (1993) ("Advocating lesbian and gay marriage will detract from, even contradict, efforts to



is that both approaches seek to “combat sexual moralism and to ameliorate the full range of hardships faced by persons associated with marginal gender or sexual identities or practices.”<sup>18</sup>

In this view, laws and social structures that embody and preserve the traditional meanings of marriage, family, sex, gender, and sexuality rest on society’s largely unconscious and deeply “insidious” preference for heterosexual relationships. At best, social and legal preferences for heterosexual relationships (“*heterophilia*”)<sup>19</sup> are “irrational.”<sup>20</sup> At worst, traditional views are the foundations upon which deeply engrained and legally sanctioned “anti-homosexual hostility” (“*homophobia*”) is built and sustained.<sup>21</sup> The result is a form of

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unhook economic benefits from marriage and make basic health care and other necessities available to all. It will also require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people.”).

18. Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 148 (2009); see, e.g., Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1187 (2006) (“If cases like *McLaughlin* and *Lawrence* are understood exclusively as points on the long road to marriage, we lose sight of the possibility that, for some people, the right to engage in sex outside of marriage might be as significant as the right to enter into a legal marriage.”).

19. See generally Zvi Triger, *Discriminating Speech: On the Heterophilia of Freedom of Speech Doctrine*, 19 CARDOZO J.L. & GENDER (forthcoming fall 2013), <http://bit.ly/heterophilia> (discussing David Schwartz, *Heterophilia – The Love that Dare Not Speak Its Aim: Commentary on Trop and Stolorow’s “Defense Analysis in Self Psychology: A Developmental View,”* 3 PSYCHOANALYTIC DIALOGUES 643, 647 (1993); Jeffrey L. Trop & Robert D. Stolorow, *Defense Analysis in Self Psychology: A Developmental View*, 2 PSYCHOANALYTIC DIALOGUES 427, 433 (1992)). In Triger’s view:

To be sure, it is not easy to draw the line between homophobia and heterophilia, and many heterophile actions can be interpreted as unconsciously homophobic. However, generally speaking, laws that privilege predominantly heterosexual institutions, such as marriage, are heterophile in nature, while laws that restrict LGBTs, discriminate against them or punish them as such, would be labeled as homophobic. Thus, laws privileging married couples and awarding them forms of protection that unmarried couples cannot receive, are heterophile as long as LGBTs cannot get married, and, probably, as long as they do not extend those privileges to all couples, married and unmarried.

*Id.* at 7 (footnote omitted).

20. Compare *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (“These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory.”) (rejecting the claim), with *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection.”).

21. E.g., Gregory M. Herek, *Beyond “Homophobia”: Thinking About Sexual Prejudice and*

legally sanctioned oppression<sup>22</sup> that creates and sustains actionable harm both to individuals<sup>23</sup> and to society as a whole.<sup>24</sup>

## 2. Affirming monogamous, conjugal marriage<sup>25</sup>

On the other side of this argument are those individuals and associations who seek to preserve and defend not only the traditional definition of marriage as the union of one man and one woman,<sup>26</sup> but also the constitutional authority of communities to make and act up-

*Stigma in the Twenty-First Century*, 1 SEXUALITY RES. & SOC. POL'Y 6, 7 & n.3 (2004); see also Raj Ayyar, Interview, *George Weinberg: Love Is Conspiratorial, Deviant & Magical*, GAYTODAY (Nov. 1, 2002), <http://www.gaytoday.com/interview/110102in.asp>.

22. See also David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 490–91 (1996) (“If the law of marriage can be seen as facilitating the opportunities of two people to live an emotional life that they find satisfying—rather than as imposing a view of proper relationships—the law ought to be able to achieve the same for units of more than two. . . . By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more (all of which, of course, include at least two persons of the same sex) and to units composed of two people of the same sex but who are bound by friendship alone.”).

23. *Johns v. Derby City Council*, [2011] EWHC (Admin) 375 (Eng. & Wales) (holding that a Christian couple’s “antipathy, objection to or disapproval of, homosexuality and same-sex relationships” made them ineligible to serve as foster parents in the United Kingdom).

24. See, e.g., *Ladele v. London Borough of Islington and Liberty*, [2009] EWCA (Civ) 1357 (Court of Appeal from the Employment Division), <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html> (holding that a public employee who held “the orthodox Christian view that marriage is the union of one man and one woman for life,” and who “could not reconcile her faith with taking an active part in enabling same sex unions to be formed” could be terminated under a municipal policy that provided that “[a]ll employees are expected to promote [the Borough’s] values at all times and to work with [its] policy” regarding affirmation of same-sex unions). But see Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 207 (2010) (arguing that religious-liberty claims should be accommodated for the same reasons that are used to accommodate same-sex-marriage claims: i.e., that “same-sex couples and religious believers claim that their conduct stems from commitments central to their identity—love and fidelity to a life partner, faithfulness to the moral norms of God—and that they should be able to live these commitments in a public way, touching all aspects of their lives”).

25. The term “conjugal” refers to the relationship of husband and wife. See *Conjugal*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/conjugal> (last visited May 17, 2013) (“relating to marriage or the relationship between husband and wife”). Strictly speaking, the phrase “conjugal marriage” is redundant (i.e., a “marriage marriage”), but for purposes of the present discussion, it is used to describe a monogamous relationship between a husband and a wife.

26. See, e.g., William C. Duncan, *Speaking Up for Marriage*, 32 HARV. J.L. & PUB. POL'Y 915, 915 (quoting President George W. Bush, The President’s Radio Address, 40 WEEKLY COMP. PRES. DOC. 1253, 1253–54 (July 10, 2004) (“If courts create their own arbitrary definition of marriage as a mere legal contract and cut marriage off from its cultural, religious, and natural roots, then the meaning of marriage is lost and the institution is weakened.”)).

on the value judgments supporting the distinctions that cultures use to distinguish and regulate human sexual behaviors.<sup>27</sup> Like their political opponents, they recognize that the battle is basically a contest over who has the authority to control the most important symbols of the dominant culture, and thus to define its content.

The cultural divide between the two camps could not be more profound. In a January 2012 “Open Letter to All Americans,” thirty-nine leaders of thirty-three American religious communities resoundingly reaffirmed the unequivocal teaching of most religious groups on marriage and family life:

The meaning of marriage precedes and transcends any particular society, government, or religious community. It is a universal good and the foundational institution of all societies. It is bound up with the nature of the human person as male and female, and with the essential task of bearing and nurturing children.<sup>28</sup>

Like their political opponents, those who take this more “conventional” view are a diverse lot. Opponents of same-sex marriage can be found at every point along the spectrum of political, cultural, philosophical, and religious belief.<sup>29</sup> Some argue that *all* sexual relations outside of marriage are to be avoided,<sup>30</sup> while others base their sup-

27. See Kevin J. Worthen, *Who Decides and What Difference Does it Make?: Defining Marriage in “Our Democratic, Federal Republic,”* 18 BYU J. PUB. L. 273, 273–74 (2004).

28. Open Letter from U.S. Religious Leaders to All Americans, Marriage and Religious Freedom: Fundamental Goods that Stand or Fall Together (Jan. 12, 2012), <http://bit.ly/Open-Letter> (signed by 39 leaders of 33 religious communities).

29. See *Behind Gay Marriage Momentum, Regional Gaps Persist*, PEW RES. CTR. FOR PEOPLE & PRESS (Nov. 12, 2012), <http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist>; *Gay Marriage & Homosexuality*, PEW F. ON RELIGION & PUB. LIFE, <http://www.pewforum.org/Topics/Issues/Gay-Marriage-and-Homosexuality> (last visited May 18, 2013).

30. See, e.g., Ch 3. *The Islamic Sexual Morality: Its Structure*, in SAYYID MUHAMMAD RIZVI, *MARRIAGE AND MORALS IN ISLAM* (1990), available at <http://bit.ly/IslamMorals>; SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, *PERSONA HUMANA: DECLARATION ON CERTAIN QUESTIONS REGARDING SEXUAL ETHICS* (Dec. 29, 1975), <http://bit.ly/PersonaHumana>; Darren E. Sherkat, Kylan Mattias de Vries & Stacia Creek, *Race, Religion, and Opposition to Same-Sex Marriage*, 91 SOC. SCI. Q. 80 (2010) (discussing the differences among religious and ethnic groups on the issue of same-sex marriage); Christina Lee Knauss, *African Methodist Episcopal Church Unanimously Rejects Same-Sex Unions*, FREE REPUBLIC (July 9, 2004), <http://www.freerepublic.com/focus/f-religion/1168649/posts>.

To the extent that religious groups condemn homosexual behavior, it follows that affirmation of same-sex marriage would be impossible. See CATECHISM OF THE CATHOLIC CHURCH §§ 2357–2358 (condemning “unjust discrimination” against persons with homosexual orientation, but noting that condemning homosexual acts cannot be approved under any circumstances because they are “intrinsically disordered,” and are “contrary to the natural law” because “[t]hey

port for the preference for the monogamous, conjugal relationship in the orderly development of children, society, and the culture as a whole.

Opposition to behaviors commonly included in the concepts of “alternative sexual arrangements” and “intimate pluralism” is even more broadly based.<sup>31</sup> Any attempt by government to compel social acceptance of these behaviors would meet with equally substantial resistance.<sup>32</sup> Policies that assume the social “construction” of sexual and gender identity and “sexual orientation” are even more controversial because of both the highly charged nature of the debate<sup>33</sup> and the un-

close the sexual act to the gift of life” and “do not proceed from a genuine affective and sexual complementarity”); Rizvi, *supra*; Bonnie J. Morris, *Challenge, Criticism and Compassion: Modern Jewish Responses to Jewish Homosexuals*, 49 JEWISH SOC. STUD. 283 (1987).

31. Among alternative sexual relationships and “intimate pluralism” are various forms of “marriage”: polygamy (marriages involving more than two people); polygyny (one male marrying multiple females); polyandry (one female marrying multiple males); polygamous marriages with more than one spouse of each sex or with marriages between persons of the same sex; informal, non-marital relationships that fall under the general rubric of polyamory, which includes sexual relationships among partners of various sexes that are maintained by negotiation and do not necessarily involve marriage; and “sex work.” See SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1998); Michèle Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 HASTINGS WOMEN’S L.J. 3 (2007); Andrew F. March, *Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification*, 8 J. MORAL PHIL. 246, 246 (2011) (“argu[ing] that the four most plausible arguments compatible with public reason for an outright legal ban on all forms of polygamy are unvictorious”); Gregg Strauss, *Is Polygamy Inherently Unequal?*, 122 ETHICS 516 (2012); Jessica Bennett, *Only You. And You. And You. Polyamory—Relationships with Multiple, Mutually Consenting Partners—Has a Coming-out Party*, NEWSWEEK (July 28, 2009, 8:00 PM), <http://www.thedailybeast.com/newsweek/2009/07/28/only-you-and-you-and-you.html>.

32. See Lara Denis, *From Friendship to Marriage: Revising Kant*, 63 PHIL. & PHENOMENOLOGICAL RES. 1 (2001); Michael E. Nielsen & Ryan T. Cragun, *Religious Orientation, Religious Affiliation, and Boundary Maintenance: The Case of Polygamy*, 13 MENTAL HEALTH, RELIGION & CULTURE 761, 766–67 (2010) (“The present data are consistent with the finding that alternative sexual and marital arrangements may generate differential treatment because of their implicit challenge to family structure. Our findings also illustrate the connection between polygamy and alternative sexual practices. Except among polygamists, attitudes toward alternative sexual practices is [sic] a significant predictor of attitudes toward polygamy.” (citation omitted)); Phebe Tucker et al., *Assessing Changes in Medical Student Attitudes Toward Non-Traditional Human Sexual Behaviors Using a Confidential Audience Response System*, 10 SEX EDUC. 37 (2010).

33. There is considerable scientific agreement on the descriptive goals of the terminology, but there is considerably less agreement concerning the uses to which these terms are put.

Particular terms may be defined differently by various authors, so it may be helpful to begin by defining those terms as they will be used here. Sex will be used to refer to the biological variables that can be described as either male or female (e.g., genes, chromosomes, gonads, internal and external genital structures), while gender will refer to social categories (e.g., man or woman, boy or girl) or factors related to living in the social role of a man or a woman. Gender identity refers to one’s sense of belonging to the male or female gender category, while gender role refers to behaviors

certainty of the science.<sup>34</sup> Litigation over policies based on these assumptions is ongoing.<sup>35</sup>

(mannerisms, style of dress, activities etc.) that convey to others one's membership in one of those categories. *Sexual orientation* refers to one's pattern of erotic responsiveness and will be described here as *androphilic* (attracted to men), *gynephilic* (attracted to women), or *bisexual* (attracted to both).

William Byne, *Developmental Endocrine Influences on Gender Identity: Implications for Management of Disorders of Sex Development*, 73 MOUNT SINAI J. MED. 950, 950 (2006); Meredith L. Chivers et al., *A Sex Difference in the Specificity of Sexual Arousal*, 15 PSYCHOL. SCI. 736 (2004).

The literature suggests that there may be significant differences in men and women. While measuring sexual orientation of men is relatively straightforward, the same measures do not produce significant results when used to measure sexual orientation in women. As a result, research "suggest[s] that sexual arousal patterns play fundamentally different roles in male and female sexuality." Chivers et al., *supra*, at 736. Dr. Bailey provided the following explanation of the discrepancy:

I think that it's important to distinguish a number of very related traits so that we know what we're talking about here.

*Sexual identity* is what you call yourself—gay, straight, bisexual, and so on. *Sexual behavior* is who you have sex with—men or women, or both. And these differ, obviously. And then there's sexual preference. And by "*sexual preference*," I mean what sex you prefer to have sex with, for whatever reason. For whatever reason. And you might prefer to have sex with—say, a man might prefer to have sex with women, even though he's more attracted to men, for moral and religious reasons. That would be a sexual preference for him.

... In men, anyway, sexual orientation is directed sexual arousal pattern that can be measured objectively—although not perfectly, with error. ...

... Women are different. Women are very different. ... They may not even have something like a sexual orientation. I think that my view right now is that, in general, women don't have a sexual orientation. That's not to say that they don't have sexual preference. Women have strong preferences. But it's not due to an arousal pattern.

Michael J. Bailey, Northwestern Univ., Remarks during panel discussion on Sexual Orientation, Gay Marriage, and Child Well-Being: Understanding the Social and Behavioral Science Debate 9–10, 16–17 (Dec. 11, 2006), <http://bit.ly/MichaelBailey>.

34. "Sexual differentiation" is an enormous topic beyond the scope of this paper, but it is relevant here because the *initial* "construction" of sex and gender are *unquestionably* accomplished by nature: i.e. one's genetic makeup. The field of neuroscience is developing rapidly, and there is considerable difference of opinion on how to interpret the results of the emergent findings. See Byne, *supra* note 33, at 956 ("The current dominance of the hormonal theory of sexual differentiation may give the impression that gonadal secretions are fully responsible for all aspects of brain sexual differentiation. Recent work, primarily in animals, however, suggests that XX and XY brain cells behave differently, in part, because of the cell-autonomous actions of X and Y genes."); Cordelia Fine, *From Scanner to Sound Bite: Issues in Interpreting and Reporting Sex Differences in the Brain*, 19 CURRENT DIRECTIONS PSYCHOL. SCI. 280, 281 (2010) (noting "the importance of not placing too much confidence in any single functional or structural neuroimaging study that seems to demonstrate a sex difference"); Olaf Hiort, Ute Thyen & Paul-Martin Holterhus, *The Basis of Gender Assignment in Disorders of Somatosexual Differentiation*, 64 HORMONE RES. 18 (2005) (abstract), <http://www.biomedsearch.com/nih/basis-gender-assignment-in-disorders/16286765.html> ("There is increasing evidence that genital development is dependent on the action of androgenic steroids; moreover, both androgens and oestro-

### B. Questioning the Science: The Politics of Expert Opinion

This is neither the time nor the setting in which to consider the debate within the natural-, biological-, or social-science communities concerning the social or physical “construction” of human sexuality. Nor is it an appropriate venue for discussing the relative merits of the research that the courts are being asked to rely on in pending cases challenging the constitutionality of limiting the concept of “marriage” to the union of one man and one woman. What is relevant here is the *nature* of the dispute over the research.

To say that the dispute is “rancorous” would be an understatement. The recent example of University of Texas Sociology Professor, Dr. Mark Regnerus, is a case in point. His recent study<sup>36</sup> has generated a firestorm of protest from angry supporters of same-sex parenting. A recent interview of Dr. Regnerus in *Christianity Today* begins with the following statement:

The survey, known as the New Family Structures Study (NFSS), is remarkable in its scope. It’s a random national sample, considered “the gold standard” of social science surveys. NFSS measures the economic, relational, political, and psychological effects on adults ages 18 to 39 who grew up in families where the father or mother

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gens may have an impact on other developing organs including neuronal structures such as the brain. Long-term outcome studies on the various intersexuality disorders are desperately needed in order to establish a basis for evidence-based medicine regarding sex assignment and treatment options.”).

35. See, e.g., *Pickup v. Brown*, No. 12-17681 (9th Cir., filed Dec. 21, 2012) (granting preliminary injunction against the enforcement of California Senate Bill 1172), [http://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000635](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000635).

Scheduled to go into effect on January 1, 2013, California Senate Bill 1172 adds Sections 865 to 865.2 to the California Business & Professions Code. Section 865.1 provides that “*Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.*” CAL. BUS. & PROF. CODE § 865.1 (2013) (emphasis added).

Section 865(b)(1) defines “Sexual orientation change efforts” as “any practices by mental health providers that seek to change an individual’s sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.” *Id.* § 865(b)(1). The definition excludes psychotherapies that “provide acceptance, support, and understanding of clients or the facilitation of clients’ coping, social support, and identity exploration and development” as well as “efforts” that “do no seek to change sexual orientation.” *Id.* § 865(b)(2). Section 865.2 provides that “Any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider.” *Id.* § 865.2.

36. Mark Regnerus, *How Different are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012).

engaged in homosexual behavior. Despite Regnerus's repeated caution that the NFSS does not account for stable same-sex marriages (since same-sex marriage as such didn't exist when the survey participants were children), he has undergone professional censure. *Social Science Research* conducted an internal audit on the peer-review process of the NFSS, and the University of Texas at Austin investigated Regnerus following allegations of "scientific misconduct." (The school has since cleared Regnerus of the allegations.)<sup>37</sup>

The University of Texas was, to be sure, required to look into any credible claims that Dr. Regnerus had violated professional ethical and research norms, but the report filed by the University's Research Compliance Officer tells a story that raises serious First and Fifth Amendment concerns. Addressing the origin of the complaint filed, the Compliance Officer notes that: "In brief, [Complainant] believed that the Regnerus research was seriously flawed and inferred that there must be scientific misconduct."<sup>38</sup> As the University found:

Whether the research designed and conducted by Professor Regnerus and reported in *Social Science Research* possessed significant limitations or was even perhaps seriously flawed is a determination that should be left to debates that are currently underway in the academy and future research that validates or invalidates his findings.<sup>39</sup>

The First Amendment issues can be briefly stated: Because there is no consensus<sup>40</sup> (and, according to Regnerus himself, not enough evidence) to draw solid conclusions about the effects of same-sex parenting on the adjustment of adult children raised in stable, same-sex

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37. Katelyn Beaty, *The Regnerus Affair*, CHRISTIANITY TODAY (Sept. 28, 2012, 4:41 PM), <http://www.christianitytoday.com/ct/2012/october/mark-regnerus-interview-gay-parenting-study.html>.

38. Memorandum from Robert A. Peterson, Research Integrity Officer, Univ. of Tex., to Steven W. Leslie, Exec. Vice President & Provost, Univ. of Tex. 3 (Aug. 24, 2012) [hereafter UT Research Integrity Inquiry], <http://www.utexas.edu/opa/wordpress/news/files/Regnerus-Inquiry-Report.pdf>.

39. *Id.*

40. See, e.g., Walter R. Schumm, *Methodological Decisions and the Evaluation of Possible Effects of Different Family Structures on Children: The New Family Structures Survey (NFSS)*, 41 Soc. Sci. Res. 1357, 1357 (2012) ("Even though the apparent outcomes of Regnerus's study were unpopular, the methodological decisions he made in the design and implementation of the New Family Structures Survey were not uncommon among social scientists, including many progressive, gay and lesbian scholars. These decisions and the research they produced deserve considerable and continued discussion, but criticisms of the underlying ethics and professionalism are misplaced because nearly every methodological decision that was made has ample precedents in research published by many other credible and distinguished scholars.").

relationships,<sup>41</sup> freedom of speech and academic inquiry require that the researcher be left alone by public authorities until “future research . . . validates or invalidates his findings.”

The important point, for present purposes, is the issue of compelled affirmation. The white-hot response to the Regnerus study tells us that there is a “politically correct” way to approach the research data. Raise serious concerns, even imperfectly, or express one’s opinion that same-sex marriage ought not to be recognized, or (worse) combine both of these positions with traditional religious beliefs on sexual ethics, and one’s credibility as a research scholar is open to serious question. Dr. Darren Sherkat, the *Social Science Research* editorial board member assigned to “audit” the Regnerus study, attacked its peer reviewers because “The peers are right wing Christians!”<sup>42</sup>

The due-process issues arise because the record is unsettled, and because both sides of the debate file voluminous amicus briefs with the courts in an effort to convince the judges of the wisdom and veracity of their respective positions regarding the facts. In the case of same-sex parenting, the conventional wisdom posits that there is “no difference” (i.e., “null hypothesis”) between the adjustment levels of children raised by heterosexual and same-sex parents. Even if we assume, for purposes of argument, that the American Psychiatric Association’s 2005 Position Statement is correct, and that when it was published, “no research ha[d] shown that the children raised by lesbians and gay men are less well-adjusted than those reared within heterosexual relationships,”<sup>43</sup> a court may not accept such a fact as having been established. Rudimentary notions of due process require that the qualifications of experts and the substance of their work must be subject to cross examination,<sup>44</sup> and judges may not take judicial

41. Mark Regnerus, *Queers As Folk: Does It Really Make No Difference If Your Parents Are Straight or Gay?*, SLATE (June 11, 2012, 6:02 AM), <http://slate.me/1bmWYsk>.

42. Scott Rose, *BOMBSHELL: Editor Darren Sherkat Admits Peer Review Failure of Invalid, Anti-Gay Regnerus Study*, NEW C.R. MOVEMENT (July 27, 2012), <http://bit.ly/11a5WF6>. Scott Rose was the complaining party in the investigation of Dr. Regnerus’s study. See UT Research Integrity Inquiry, *supra*, note 38, at 1.

43. See AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON SUPPORT OF LEGAL RECOGNITION OF SAME-SEX CIVIL MARRIAGE (2005), <http://bit.ly/APA-position>; Brief for Am. Psychological Ass’n et al. as Amici Curiae Supporting Plaintiff-Appellee and Supporting Affirmance at 21, *Golinski v. Office of Pers. Mgmt.*, Nos. 12-15388, 12-15409 (9th Cir. July 10, 2012), <http://bit.ly/APA-amicusbrief>.

44. FED. R. EVID. 702–705.



notice of disputed facts unless they are “not subject to reasonable dispute” because “generally known within the trial court’s territorial jurisdiction” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”<sup>45</sup>

### III. THE NATURE OF THE DISPUTE

There is an obvious—and profound—*moral* disagreement between advocates and opponents of legal recognition of same-sex relationships. Because proponents believe that “both sexuality and gender [are] not . . . something that people ‘are,’ but [rather] something that they ‘do’—that is, that they accomplish in social interaction,”<sup>46</sup> the quest for recognition necessarily requires a re-evaluation of the social morality of laws, institutions, and social structures that regulate or condemn the types of conduct that express a person’s unique sexual or “gendered” identity.<sup>47</sup> If respect for human dignity requires acceptance of those behaviors, it also requires a public policy that affirms them through both formal recognition and an active effort to suppress individual and institutional expression or conduct that conveys “a message of disapproval.”<sup>48</sup> The California Supreme Court put the issue this way:

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45. FED. R. EVID. 201(b).

46. Carpenter, *supra*, note 12.

47. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 212 (1995) (“Native Americans . . . did not conflate official birth sex with gender in a deductive, intransitive manner . . . ; native gender was not merely the performance of official birth sex. Consequently, the native [Zuni] sex/gender system allowed each individual a high degree of autonomy and flexibility over gender, and generally facilitated sex/gender diversities based on personalized ability and appearance.” (footnote omitted)).

This rough sense of equality, coupled with non-conflationary alignments of sex and gender, also allowed a great deal of freedom for varied and individuated expressions of sexuality, regardless of sex or sexual orientation: because sex fixed neither gender nor destiny, because active/passive themes and traditions did not underlie native sex/gender arrangements, and because in this scheme sexuality was not elemental to gender, neither cross-sex nor same-sex relations could claim intrinsic superiority over the other. In this way, native cultures also avoided the heterosexism that is endemic to Euro-American sex/gender arrangements specifically under Leg Two of the conflation.

*Id.* at 214 (footnotes omitted).

48. See, e.g., *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 464 F. Supp. 2d 938 (N.D. Cal. 2006), *aff’d en banc*, 624 F.3d 1043 (9th Cir. 2010) (dismissing a claim that the City and County of San Francisco violated the Establishment Clause by adopting a formal resolution condemning the Catholic Church’s teachings on homosexuality).

[F]or a number of reasons we conclude that in the present context, affording same-sex couples access only to the separate institution of domestic partnership, and denying such couples access to the established institution of marriage, properly must be viewed as impinging upon *the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples.*

First, because of the long and celebrated history of the term “marriage” and the widespread understanding that this term describes a union unreservedly approved and favored by the community, there clearly is a considerable and undeniable symbolic importance to this designation. . . .

Second, particularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term “marriage” is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship. . . .

Third, it also is significant that although the meaning of the term “marriage” is well understood by the public generally, the status of domestic partnership is not.<sup>49</sup>

Religious believers who convey individual and collective messages of disapproval are, from this perspective, those who would maintain “traditionalist androcentric *and* heterocentric biases in law and society” and “legitimize and foster the elevation of masculinity over femininity as well as the elevation of heterosexuality over all other forms of sexuality.”<sup>50</sup> To the extent that public officials and judges subscribe to the view “that religion lies at the heart of the hostility and violence directed at gays and lesbians,”<sup>51</sup> it follows that religious be-

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49. *In re Marriage Cases*, 183 P.3d 384, 445–46 (Cal. 2008) (emphasis added).

50. Valdes, *supra* note 47, at 125. Professor Valdes defines “androsexism” as “the kind of ‘sexism’ biased in favor of ‘male’-identified concepts, ideals, or constructions; ‘heterosexism’ as ‘belief systems biased in favor of cross-sex social and sexual arrangements, or ‘heterosexuality’”; and “hetero-patriarchy” as “the fusion of androsexism and heterosexism, both socially and sexually, to obtain and maintain the supremacy of ‘masculinity’ and of ‘masculine’-identified (heterosexual) men, over personal, economic, and cultural life.” *Id.* at 8 nn. 12–14.

51. In *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012), Judge Walker summarizes the testimony of Paul Nathanson, a researcher at

liefs—and, by implication, the religiously motivated voters who hold them—must be viewed “as the chief obstacle to gay and lesbian political advances.”<sup>52</sup>

This is no ordinary political dispute. Advocates for the LGBT community and other supporters of same-sex marriage have long argued that “fear,” not reason or experience, is the foundation of traditional religious beliefs about homosexual behavior and family relationships. Dr. Gregory Herek, one of the lead witnesses in the district-court hearing in *Perry*,<sup>53</sup> has written that psychologist George Weinberg coined the term “homophobia” to make that very point:

I coined the word homophobia to mean it was a phobia about homosexuals. . . . It was a fear of homosexuals which seemed to be associated with a fear of contagion, a fear of reducing the things one fought for—home and family. *It was a religious fear and it had led to great brutality as fear always does.*<sup>54</sup>

Nor is this an ordinary constitutional dispute. If traditional views about the nature of marriage and sexual ethics are based on religiously grounded fears, rather than on good-faith differences of opinion, the Constitution requires both courts and public officials to take affirmative steps to ensure that laws, policies, and practices grounded in such fears—like racial discrimination—“be eliminated root and branch.”<sup>55</sup>

McGill’s Faculty for Religious Studies: “Nathanson testified at his deposition that religion lies at the heart of the hostility and violence directed at gays and lesbians and that there is no evidence that children raised by same-sex couples fare worse than children raised by opposite-sex couples.” *Id.* at 945.

52. *Id.* at 937.

Political scientist Gary Segura provided many examples of ways in which private discrimination against gays and lesbians is manifested in laws and policies. Segura testified that negative stereotypes about gays and lesbians inhibit political compromise with other groups: “It’s very difficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person. That’s just not the basis for compromise and negotiation in the political process.” Segura identified religion as the chief obstacle to gay and lesbian political advances.

*Id.* (citation omitted).

53. *Id.* at 921.

54. Herek, *supra* note 21 (internal quotation marks omitted); see also Ayyar, *supra* note 21.

55. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968) (“School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”).

In *Varnum v. Brien*,<sup>56</sup> the Iowa Supreme Court unanimously agreed: “Consequently, we address the religious undercurrent propelling the same-sex marriage debate as a means to fully explain our rationale for rejecting the dual-gender requirement of the marriage statute.”<sup>57</sup>

The court was blunt: “[R]eligious opposition to same-sex marriage” is the real, though unstated, “reason for the exclusion of gay and lesbian couples from civil marriage.”<sup>58</sup>

While unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling.<sup>59</sup>

Such a situation is, in the court’s view, intolerable. While it acknowledged that “such views are not the only religious views of marriage” and that “other equally sincere groups and people in Iowa and around the nation have strong religious views that yield the opposite conclusion,”<sup>60</sup> it is the “undercurrent” of religious *opposition* that creates the constitutional problem.

After *Varnum*, a claim that a law or policy is rooted in religious belief requires an Iowa judge to determine whether state legislation expresses “religious views, either directly or indirectly.”<sup>61</sup> That determination will, in turn, depend on a judicial finding that the religious beliefs of those who support the law bear a strong “concep-

56. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

57. *Id.* at 904.

58. *Id.*

59. *Id.*

60. *Id.* at 904–05. Advocates for deconstructing sexual ethics based on the Abrahamic religious traditions concede that alternative models of ethics are also based on religious beliefs. See, e.g., Valdes, *supra* note 47, at 214–15.

Instead, a form of egalitarian empowerment of both sexes through pansexual expression and interaction flowed from basic Native American beliefs about the nature of the human body and of human sexuality in general. In contrast to Euro-American skittishness, native cultures did not view bodily or sexual activities as embarrassing or shameful either for men or for women: “Modesty and shame were not sentiments the Pueblo Indians knew in relationship to their bodies.” Instead, “[s]exuality was equated with fertility, regeneration, and the holy.” More specifically, “[s]exual intercourse was the symbol of cosmic harmony . . . because it united in balance all the masculine forces of the sky with all the feminine forces of the earth.” Therefore, “sexuality was deemed essential for the peaceful continuation of life.”

*Id.* (alteration in original) (footnotes omitted).

61. *Varnum*, 763 N.W.2d at 905.

tual resemblance to the expressed secular rationale[s]" offered by the state to support it.<sup>62</sup>

The belief that the "sanctity of marriage" would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition. *Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief.*<sup>63</sup>

The *Varnum* court thus concludes that the Iowa Constitution's Establishment Clause<sup>64</sup> requires judicial intervention in heated policy disputes whenever the complaining party can successfully characterize the debate as a "theological debate of religious clerics."<sup>65</sup>

This contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa's same-sex-marriage ban. Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government *avoids* them. The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, "Marriage is a civil contract" and then regulates that civil contract. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licens-

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62. *Id.* at 904; see Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) [hereinafter Walker & Monahan, *Social Frameworks*]; John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986). Although it is not clear if judicial reliance on findings of "social fact" is legitimate in constitutional decision-making, it is quite clear, as Professors Walker and Monahan put it, that there is a "more generic movement on the part of American courts to use general research findings to create a context or background within which facts specific to a case can be determined." Walker & Monahan, *Social Frameworks*, *supra*, at 571 n.32. The use of "social fact" as background played an important role in shaping the Supreme Court's approach, if not the outcome of the case itself. It is in the social-framework sense that the term "social fact" is used here.

63. *Varnum*, 763 N.W.2d at 904 (emphasis added) (footnotes omitted).

64. IOWA CONST. art. I, §3.

65. *Varnum*, 763 N.W.2d at 905.

ing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.<sup>66</sup>

This not a new argument. Those who oppose religious activism in politics have argued for years that courts are capable of distinguishing “secular” from “religious” arguments.<sup>67</sup> They have also argued that sensitive ethical issues can be avoided, and that judges can preserve their neutrality on disputed political and moral issues, if courts focus only on process questions.<sup>68</sup>

Had the Iowa Supreme Court limited its discussion in *Varnum* to the freedom shared by all citizens to make a civil contract,<sup>69</sup> there would have been no occasion to discuss the “religious undercurrent propelling the same-sex marriage debate.”<sup>70</sup> That discussion became necessary, in the court’s view, because marriage is far more than a civil contract. It is the means by which the political community “recognize[s] the status of the parties’ committed relationship.”<sup>71</sup>

And thus, the constitutional issue is joined: Unless the political community and individual citizens are willing to take active steps to *affirm* the status of alternative “committed relationships,” the courts will use equal-protection principles to compel them to do so. This is also the goal in *Perry* and *Windsor*. A Supreme Court holding that the United States Constitution requires that the states and the federal government must affirm that same-sex unions are “marriages” cannot

66. *Id.* (citations omitted).

67. See, e.g., Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 813–14 (1984) (discussing Professor Laurence Tribe’s proposal “that everything ‘arguably religious’ should count as religious for free exercise purposes, and everything ‘arguably nonreligious’ should count as nonreligious for establishment purposes (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 812–87 (1st ed. 1978))”); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 835 (1984) (“Professor Tribe’s approach has the objectionable effect of permitting those groups and persons whose beliefs are both arguably religious and arguably not religious to . . . have it both ways, which happens to be the classic definition of unfair preference. Members of traditional, ‘indisputably religious’ churches could hardly be expected to see the dual definition as anything but legalistic flim-flam in the service of nontheistic religious ideology.”).

68. See, e.g., *Harris v. McRae*, 448 U.S. 297, 332–33 (1980) (Brennan, J., dissenting) (“[A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy.” (quoting *Beal v. Doe*, 432 U.S. 438, 449 (1977))).

69. *Varnum*, 763 N.W.2d at 905 (“The statute declares, ‘Marriage is a civil contract’ and then regulates that civil contract.”).

70. *Id.* at 904.

71. *Id.* at 883 (citing *Madison v. Colby*, 348 N.W.2d 202, 206 (Iowa 1984)).

be “the end” of the effort. Rather, as Winston Churchill observed after the Battle of El-Alamein: “It is not even the beginning of the end. But it is, perhaps, the end of the beginning . . .”<sup>72</sup> of a much more active and long-term effort to use federal and state laws, courts, the educational system, and major cultural institutions to demonize and then to eliminate traditional concepts of *gender*, *patriarchy*, and *heteronormativity* from the law, and thus “to call attention to the legal (and social) fiction of ‘homosexuality.’”<sup>73</sup>

The constitutional debate over same-sex marriage is, therefore, a debate over three related but distinct concepts: (1) the extent to which the Constitution permits the People to make and convey communal value judgments about which sexual relationships will be acknowledged, tolerated, or discouraged; (2) the extent to which individuals and associations are free to act in a manner that is inconsistent with those value judgments; and (3) the meaning of equal citizenship and political participation.

### *A. Religion on Trial*

The litigation over both California’s Proposition 8 and the federal Defense of Marriage Act demonstrates that the courts have, by and large, accepted the contention of Dr. Gary Segura, one of the witnesses at the Proposition 8 trial, that “religion [is] the chief obstacle to gay and lesbian political advances.”<sup>74</sup>

[R]eligion is the chief obstacle for gay and lesbian political progress, and it’s the chief obstacle for a couple of reasons. . . . [I]t’s difficult to think of a more powerful social entity in American society than the church. . . . [I]t’s a very powerful organization, and in large

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72. RANDOM HOUSE WEBSTER’S QUOTATIONARY 58 (Leonard Roy Frank ed., 1999) (quoting Winston Churchill, Speech at the Lord Mayor’s Day luncheon, Mansion House, London (Nov. 10, 1942)).

73. Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?*, 9 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 279, 297 (1999) (citing Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 364 (1995) (“[I]n order to dismantle the Euro-centric hetero-patriarchal *status quo* and to attain the ultimate goal of sex/gender equality, Queer legal theory must pursue a strategy that relentlessly combats the conflation [of sex, gender, and sexual orientation] and its sex/gender ideology.”)).

74. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 937 (N.D. Cal. 2010), *aff’d sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.*, Hollingsworth v. Perry, 133 S. Ct. 786 (2012).

measure they are arrayed against the interests of gays and lesbians. . . . [B]iblical condemnation of homosexuality and the teaching that gays are morally inferior on a regular basis to a huge percentage of the public makes the . . . political opportunity structure very hostile to gay interests. It's very difficult to overcome that.<sup>75</sup>

The trial court's opinion contains page after page of evidence concerning the religious views of the proponents of Proposition 8, all leading up to the conclusion that refusal to affirm the equal status and legitimacy of same-sex relationships is "irrational," and can be compelled.

In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.

....

Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples.<sup>76</sup>

The Second Circuit's conclusion in *Windsor v. United States*<sup>77</sup> is to the same effect: Congress is compelled by equal-protection principles to affirm same-sex relationships because "tradition is hard to justify as meeting the more demanding test of having a substantial relation to an important government interest."<sup>78</sup>

### *B. The Importance of the Analogy to Race*

The analogy to race<sup>79</sup> has played a pivotal, and highly symbolic, role in the debate over legal recognition of same-sex unions. As

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75. *Id.* at 985 (alterations in original) (internal quotation marks omitted).

76. *Id.* at 1002–03 (citations omitted).

77. *Windsor v. United States*, 699 F.3d 169 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012).

78. *Id.* at 187.

79. Professor Valdes's discussion of the miscegenation analogy is one of the most suc-



framed today, the analogy to race is the single, most powerful rhetorical argument in favoring legal recognition of same-sex relationships; for it explicitly appropriates the moral force of the civil-rights movement, as exemplified by the leadership of Dr. Martin Luther King, Jr., the courage of Rosa Parks, and the quiet courage and perseverance of millions of African Americans (and their supporters) in the face of generations of slavery, legally enforced racial segregation, political exclusion, and ongoing debates over the most efficient ways to eliminate that legacy.

For present purposes, this Article focuses on two aspects of the analogy to race that have received inadequate attention to date: (1) the political-equality aspects and (2) the natural-rights components of the analogy. Isolating these components will facilitate closer examination of the reasons why advocates and opponents of legal recognition of same-sex relationships draw such radically different conclusions from the First and Fourteenth Amendments and the structure of federalism. It also helps to highlight the high-stakes, constitutional realpolitik so clearly in evidence in the Hawaii Supreme Court's claim that "constitutional law may mandate, like it or not, that customs change with an evolving social order."<sup>80</sup>

### *1. Dred Scott, natural rights, and the politics of political equality*

A close examination of the analogy to race begins with the Supreme Court's infamous decision in *Dred Scott v. Sandford*.<sup>81</sup>

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cinct explanations I have found in the literature. In his view, "[d]iscrimination thought to be based on sexual orientation actually is based on sex because sexual orientation typically is deduced from the sex of the Plaintiffs and of their sexual partners."Valdes, *supra* note 47, at 200 (internal quotation mark omitted).

Under this reformulation, the logic of the analogy unfolds in three steps. First, the miscegenation analogy shows that sex serves as the touchstone of sexual orientation. Second, the analogy reasons that this interaction between sex and sexual orientation demonstrates that discrimination against humans with any particular sexuality must be recognized as based on sex. *Finally, the analogy argues that this type of discrimination is akin to the invidious discrimination underlying miscegenation laws, and that such discrimination therefore is unlawful for the same reasons and despite the same asserted defenses.* The miscegenation analogy thus relies on a trio of traits: race, sex, and sexual orientation to make its point. Using race (and racism) to frame this analysis, the analogy thus urges termination of the legality attributed to "sexual orientation" discrimination due to its linkage—or conflation—with discrimination based on sex.

Valdes, *supra* note 47, at 200–01 (emphasis added) (footnote omitted).

80. Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993).

81. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Professor David Currie has

The constitutional question presented to the Court in *Dred Scott* was deceptively simple. The Court was not writing on a clean slate. Mr. Scott had argued (correctly under Missouri law at the time): "The most general and appropriate definition of the term citizen is 'a freeman.' Being a freeman, and having his domicile in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him"<sup>82</sup> to file a petition for a redress of his grievances against Mr. Sandford.<sup>83</sup>

The Court, however, was not prepared to accept the social implications of that otherwise-unremarkable jurisdictional holding, because it would have implicitly acknowledged that persons of African descent enjoy the same natural right of political equality as other

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written that *Dred Scott* "was at least very possibly the first application of substantive due process in the Supreme Court, and in a sense, the original precedent for *Lochner v. New York* and *Roe v. Wade*." David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 736 & nn. 262-64 (footnotes omitted).

82. *Dred Scott*, 60 U.S. (19 How.) at 531 (McLean, J., dissenting); see U.S. CONST. art. III, § 2.

83. Mr. Scott's goal was to sue for his freedom. Under the relevant law at the time, this question was not presented directly, but rather through an action for breach of an implied contract (*assumpsit*) for the value of the services rendered by the person seeking his or her freedom. If the person was held to be "in service," there was no obligation for the master to pay, but if the person alleged to be a slave were actually a free person, the employer would be liable for the fair market value of the services rendered. Thus, Mr. Scott's suit was for *trespass vi et armis*: i.e., for damages against his former owner for having forcibly held Mr. Scott and members of his family as slaves.

In *Jarrot v. Jarrot*, 7 Ill. 1 (1845), the Illinois Supreme Court held that the Illinois Constitution permitted persons alleged to be slaves to sue for the value of compelled labor. *Dred Scott* was held "in service" in Illinois. Federal law, the Northwest Ordinance of 1787, did not recognize the institution of slavery, and the Missouri Compromise prohibited it in the Minnesota Territory.

Missouri was a slave state but did recognize the right of a person alleged to be a slave to sue in *assumpsit* for the value of his services. With respect to the specific issue in that case, the court had held that Illinois law operates as a manumission of a slave who provides labor for the master in Illinois, and that the status of master/slave does not revive when the person so freed returns to a slave state. Asserting his right to sue in *assumpsit*, *Dred Scott* had sued in Missouri, but the Missouri court held that it would no longer give comity to Illinois law on this point.

Times are not now as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances, it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others.

*Scott v. Emerson*, 15 Mo. 576, 586 (1852).

Americans: i.e., "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property."<sup>84</sup> Rather than rely on the settled law of Missouri and the text of the Constitution, the Court answered the question by reference to "the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted"<sup>85</sup> and by reference to "the public history of every European nation."<sup>86</sup> In the Court's view, persons of African descent could have no political rights, even if they had been emancipated,<sup>87</sup> because they had no natural rights.

They had for more than a century before [the ratification of the Constitution] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or

84. Section 1 of the Civil Rights Act of 1866, 14 Stat. 27 (1866), provided, in relevant part:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

85. *Dred Scott*, 60 U.S. (19 How.) at 407 (majority opinion).

86. *Id.*

87. Writing in *Bryann v. Walton*, 14 Ga. 185, 198 (1853), Justice John Henry Lumpkin of the Georgia Supreme Court wrote:

Whereas, we maintain, that the *status* of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity, whatever, except such as are bestowed on him by Statute; that he can neither contract, nor be contracted with; that the free negro can act only by and through his guardian; that he is in a state of perpetual pupillage or wardship; and that this condition he can never change by his own volition. It can only be done by Legislation.

That the act of manumission confers no other right but that of freedom from the dominion of the master, and the limited liberty of locomotion; that it does not and cannot confer *citizenship*, nor any of the powers, civil or political, incident to *citizenship*; that the social and civil degradation, resulting from the taint of blood, adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus; that nothing but an Act of the Assembly can purify, by the salt of its grace, the bitter fountain—the "*darkling sea*."

political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.<sup>88</sup>

Viewed in the legal context from which they arose, Sections One and Five of the Fourteenth Amendment were legislative responses to the well-founded fear of the Reconstruction Congress that a hostile<sup>89</sup> Supreme Court would strike down the Civil Rights Act of 1866<sup>90</sup> and thereby make it impossible for Congress and the States to ensure the political equality of their citizens. The Court had taken that power away from them in *Dred Scott*.<sup>91</sup> The Citizenship and Privileges and Immunities Clauses of the Fourteenth Amendment expressly reclaimed it, and gave it back to the federal government and to the states, respectively.

But the Court does not readily cede power. Subsequent amendments<sup>92</sup> have been necessary to remind the Court that conceptions of rights firmly rooted in the nature of the human person are the *only* enduring basis for the political-equality principles woven like threads into the very fabric of the Constitution. Nonetheless, the Court has

88. *Dred Scott*, 60 U.S. (19 How.) at 407.

89. The Court's hostility, both to the cause of civil rights and to the power of Congress and the States to create enforcement remedies that would eliminate the vestiges of race-based slavery, is underscored by the opinions in *The Civil Rights Cases*, 109 U.S. 3, 23–29 (1883) (parts of majority opinion; parts of dissenting opinion of Harlan, J.).

90. Civil Rights Act of 1866, 14 Stat. 27 (1866).

91. In *Dred Scott v. Sandford*, the Court interpreted Article IV in a manner that negated the federalism it embodies. By reading the scope of congressional power over the territories narrowly, the Court gutted both the Missouri Compromise and the power of Congress under Article IV, § 3 to adopt “all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” By permitting the Missouri Supreme Court to refuse to give effect to the law of Illinois governing the personal status and contractual capacity of those who resided in Illinois or entered into contractual relationships to be performed there, *Jarrot v. Jarrot*, 7 Ill. 1 (1845), the Court negated the cooperative federalism implicit in the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1; *Dred Scott*, 60 U.S. (19 How.) at 555–58 (McLean, J., dissenting). The gutting of Article IV made it impossible for either Congress or the free states to protect the privileges and immunities of individuals living within their respective jurisdictions.

92. The text of the Fifteenth Amendment underscored the central message that the Thirteenth and Fourteenth Amendments were intended to convey: *That all persons born or naturalized in the United States are citizens of the United States and of the states in which they reside, and are entitled to all privileges and immunities of state and federal citizenship without regard to their race.* Later amendments extended the guarantee of political equality to women, U.S. CONST. amend. XIX (1920), to citizens of the District of Columbia, U.S. CONST. amend. XXIII (1961), to citizens who cannot afford to pay poll taxes, U.S. CONST. amend. XXIV (1964), and to persons who have attained the age of 18, U.S. CONST. amend. XXVI (1971).

only rarely been willing to accept natural-rights arguments as either valid or probative<sup>93</sup>—and it has *never* accepted them in the context of race.<sup>94</sup> For reasons that will be explored in greater detail below, the Court prefers a substantive due-process approach that subordinates the natural rights of individuals to its institutional understanding of the demands of the culture.<sup>95</sup>

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93. The struggle within the Court of the natural-rights aspects of sex-based training programs was very much on display in *United States v. Virginia*, 518 U.S. 515 (1996). Because the State of Virginia and VMI did not appear even to have tried to create and tailor an “adversative” system designed to equip women for leadership roles in the military, the Justices never had an occasion to address the legitimacy of single-sex educational programs that build upon actual differences between men and women that are demonstrably relevant to success in a military environment. The debate has been impoverished as a result. Compare, e.g., Dawinder S. Sidhu, *Are Blue and Pink the New Brown? The Permissibility of Sex-Segregated Education as Affirmative Action*, 17 CORNELL J.L. & PUB. POL’Y 579, 596 (2008) (arguing an affirmative-action rationale as the “exceedingly persuasive justification” for sex-based educational programs), with Peggy DesAutels, *Sex Differences and Neuroethics*, 23 PHIL. PSYCHOL. 95, 95 (2010) (“For if, as some neuroscientists claim, there are significant differences in the brains of men versus women and in the brains of boys versus girls, the ethical and social implications loom very large indeed.”).

94. The closest the Court has come to repudiating the use of race in government programs is *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). Justice Thomas’s concurring opinion took aim at Justice Breyer’s view.

Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*. This approach is just as wrong today as it was a half century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.

*Id.* at 748 (Thomas, J. concurring) (citation omitted).

95. Post–New Deal discussions of the allocation of political jurisdiction assume that the Constitution assigns primary responsibility for defining and protecting our rights as individuals to the “Judicial Department” of the federal government. Two related subsidiary propositions flow from this assumption. One is that the obligation of the judicial department to render judgment in cases of alleged abuse or usurpation of power is (or should be) inversely proportional to the political power the litigant can command in the public arena. See, e.g., John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 9, 16 (1978) (arguing that the role of courts should be limited to protection of the politically powerless). The other is that the allocation of power between the federal government and the states is qualitatively different for constitutional purposes than, for example, the relationship between the legislative and judicial branches. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding broad grant of jurisdiction to bankruptcy courts was unconstitutional). For a more extensive discussion of these topics—and their application in a human-rights context—see Robert A. Destro, *Federalism, Human Rights, and the Realpolitik of Footnote Four*, 12 WIDENER L.J. 373 (2003).

2. *Political equality and natural rights: Perez v. Lippold and the attack on Dred Scott and Plessy*

It is ironic that the LGBT community and other supporters of same-sex marriage have put traditional religious beliefs about sexual ethics and behavior on trial in the dispute over legal recognition of same-sex and alternative-sexual relationships. It is doubly ironic that the teachings of the Roman Catholic Church about the nature of human sexuality have been singled out for an explicit, public condemnation by the Board of Supervisors of the City and County of San Francisco.<sup>96</sup> For those very teachings are the philosophical foundation of the analogy to race from which the argument for same-sex marriage draws its emotive force, and on which they have staked their claims in the same-sex-marriage cases.

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96. Catholic League for Religious & Civil Rights v. City & Cnty. of S.F., 464 F. Supp. 2d 938, 940 (N.D. Cal. 2006), *aff'd en banc*, 624 F.3d 1043 (9th Cir. 2010) (quoting Board of Supervisors, City and County of San Francisco, Resolution No. 168-06 (March 21, 2006)).

Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and

WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and

WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of Faith [sic] at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

Professor Fay Botham<sup>97</sup> provides an in-depth account of a fascinating, but largely unknown, story about the positive influence that Catholic moral principles have had on this nation's understanding of both race relations and the nature of marriage. Most of the material that appears in this section is drawn from her book.

Religion appears in *Perez v. Lippold*—the California Supreme Court case in which Perez and Davis won the right to marry—in two critical but very different ways. First, Perez took place wholly within the multiracial Catholic context of California, and specifically, within a progressive interracial Catholic parish in Los Angeles. . . . Second, as the couple's desire to marry became a legal matter, their Catholic attorney, Daniel Marshall, inserted Catholic belief directly into his legal arguments. He developed an explicitly religion-based legal strategy that made religious freedom—and specifically, religious freedom for Catholics—the basis of his case. Analysis of religion in *Perez* thus underscores, on the one hand, Christianity and region, and on the other, Christianity and law. Both of these issues in turn underline the centrality of Catholic Christianity in *Perez*.<sup>98</sup>

*Perez v. Lippold*<sup>99</sup> is the case that marks the beginning of the end for anti-miscegenation laws across the country. The California Supreme Court decided the case in 1948, a point in time when it was impossible to mount a frontal, federal attack on the eugenic racism embedded in California's anti-miscegenation law.<sup>100</sup> Just as the Reconstruction Congress had feared, the U.S. Supreme Court had refused to implement the political-equality principles embedded in Section One of the Fourteenth Amendment. The Court had also set back the cause of equal citizenship and human dignity for generations when it affirmed Jim Crow laws in *Plessy v. Ferguson*<sup>101</sup> and the eugenic sterilization of persons with mental disabilities in *Buck v. Bell*.<sup>102</sup> The Court's less-than-fulsome repudiation of racial dispari-

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97. FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, AND AMERICAN LAW* (Kindle ed. 2009).

98. *Id.* at locations 207–10.

99. *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

100. See Robert A. Destro, Introduction, *Law and the Politics of Marriage: Loving v. Virginia After 30 Years*, 47 CATH. U. L. REV. 1207 (1998); Emily Field Van Tassel, "Only the Law Would Rule Between Us": *Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 916–27 (1995).

101. *Plessy v. Ferguson*, 163 U.S. 537, 544–45 (1896).

102. *Buck v. Bell*, 274 U.S. 200 (1927).

ties in public education in *Brown v. Board of Education*<sup>103</sup> would not enter the nation's consciousness for another seven years. When *Perez* was decided, "separate, but equal" was the law of the land.<sup>104</sup>

Sylvester Davis, an African American man, and Andrea Perez, a Hispanic woman of Mexican descent, were members of St. Patrick's Catholic Church in Los Angeles. When they became engaged in 1947, they asked their pastor, Father Joseph Della Torre, about getting married in the church. He told them that Los Angeles County would not issue them a license because the bride-to-be was a white woman and her fiancé was a black man.

Ms. Perez had worked as a babysitter for a couple who were also members of St. Patrick's—Daniel and Dorothy Marshall. She contacted the Marshalls to see if they might be able to help. Daniel Marshall, the President of the Catholic Interracial Council of Los Angeles, a group that met regularly at St. Patrick's, readily agreed to take their case.

Since Mr. Marshall knew that a frontal, legal attack on eugenic racism was impossible, he took a different approach—and, in doing so, changed history. In a spring 1947 letter to Los Angeles Auxiliary Bishop Joseph McGucken, Marshall explained that his case against the law would rest on religious liberty, not racial equality. After setting out the basic principles of the Catholic theology of marriage, in which "[t]here is no rule, regulation[,] or law of the Roman Catholic Church which forbids a white person and a Negro person from re-

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103. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954).

104. The Court's words in *Plessy* bear repeating here:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. . . .

....  
We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

*Plessy*, 163 U.S. at 544, 551.



ceiving conjointly the sacrament of matrimony and thus to intermarry,”<sup>105</sup> the Petition for a Writ of Mandamus argued:

15. Said refusal of respondent to issue petitioners said license to intermarry results in and has the effect (a) of denying to them, and each of them, the right to participate fully in the sacramental life of the religion in which they believe, as aforesaid; (b) prohibits the free exercise by petitioners of their said religion; (c) violates the guaranty to petitioners of the free exercise and enjoyment by them of their religious profession and worship; (d) violates each of the First and Fourteenth Amendments of the Constitution of the United States; (e) violates Article I, Section 4 of the Constitution of 1879, of the State of California;

16. Section 69 of the Civil Code of the State of California is arbitrary, capricious and without reasonable relation to any purpose within the competency of the state to effect[.]<sup>106</sup>

The strategy was brilliant. An attack on the eugenic racism of *Dred Scott* and *Plessy* that was embedded in Section 69 of the Civil Code<sup>107</sup> was neatly wrapped inside an argument that the state had neither the right—nor any legitimate reason—to interfere with the sacramental life of the Church and its members.

Pope Pius XI's 1937 Encyclical, *Mit Brennender Sorge*, had expressly (and in German) condemned Third Reich's eugenic theories of racial purity as a “myth of race and blood.”<sup>108</sup> It pleaded with

105. Petition for a Writ of Mandamus, Memorandum of Points and Authorities, and Proof of Service at 3, *Perez v. Moroney*, No. LA 20305 (Cal. Aug. 8, 1947), <http://db.tt/Q19sWATo>.

106. *Id.* at 4–5.

107. *See Perez v. Lippold*, 198 P.2d 17, 18 (Cal. 1948).

Civil Code section 69 implements Civil Code section 60, which provides: “All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.” This section originally appeared in the Civil Code in 1872, but at that time it prohibited marriages only between white persons and Negroes or mulattoes. It succeeded a statute prohibiting such marriages and authorizing the imposition of certain criminal penalties upon persons contracting or solemnizing them. Since 1872, Civil Code section 60 has been twice amended, first to prohibit marriages between white persons and Mongolians and subsequently to prohibit marriages between white persons and members of the Malay race.

*Id.* (citations omitted).

108. Pope Pius XI, Encyclical Letter, *Mit Brennender Sorge*, at para. 17 (Mar. 14, 1937), [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_14031937\\_mit-brennender-sorge\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_en.html) (“The peak of the revelation as reached in the Gospel of Christ . . . knows no retouches by human hand; it admits no substitutes or arbitrary alternatives such as certain leaders pretend to draw from the so-called myth of race and blood. . . . Should any man

Germans to remember that the “real common good ultimately takes its measure from man’s nature,” and argued that any law or policy that ignores human nature will “shake the pillars on which society rests, and . . . compromise social tranquility, security and existence.”<sup>109</sup> The 1910 *Catholic Encyclopedia* had made the same point with respect to marriage.

When men pretend to be the final arbiters of the marriage contract, they base their claim on the assumption that this contract is merely of human institution and is subject to no laws above those of man. But human society, both in its primitive and organized form, originated by marriage, not marriage by human society. . . . Evolutionists, indeed, account for marriage by the gregarious habits of human beings. They consider it a developed social instinct, a matter of utility, convenience, and decency, a consequence of sexual intercourse, which human society decided to regulate by law, and thus encourage a state of affairs conducive to the peace and happiness of the race. They do not deny that the religious feeling latent in the human heart regarding marriage and the religious ceremonies attendant on its celebration have their utility, but they insist that marriage is entirely a natural thing.<sup>110</sup>

All four justices in the *Perez* majority accepted Mr. Marshall’s argument.

[The racial characteristics contained in] Section 69 of the Civil Code and section 60 on which it is based are . . . too vague and uncertain to be upheld as a valid regulation of the right to marry. Enforcement of the statute would place upon the officials charged with

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dare, in sacrilegious disregard of the essential differences between God and His creature, between the God-man and the children of man, to place a mortal, were he the greatest of all times, by the side of, or over, or against, Christ, he would deserve to be called prophet of nothingness, to whom the terrifying words of Scripture would be applicable: ‘He that dwelleth in heaven shall laugh at them.’” (citation omitted)).

109. *Id.* at para. 30 (“To overlook this truth is to forget that the real common good ultimately takes its measure from man’s nature, which balances personal rights and social obligations, and from the purpose of society, established for the benefit of human nature. Society, was intended by the Creator for the full development of individual possibilities, and for the social benefits, which by a give and take process, everyone can claim for his own sake and that of others. Higher and more general values, which collectivity alone can provide, also derive from the Creator for the good of man, and for the full development, natural and supernatural, and the realization of his perfection. To neglect this order is to shake the pillars on which society rests, and to compromise social tranquility, security and existence.”).

110. *Catholic Encyclopedia, Moral and Canonical Aspect of Marriage*, CATHOLIC ONLINE, <http://www.catholic.org/encyclopedia/view.php?id=7602> (last visited May 26, 2013).

its administration and upon the courts charged with reviewing the legality of such administration the task of determining the meaning of the statute. That task could be carried out with respect to persons of mixed ancestry only on the basis of conceptions of race classification not supplied by the Legislature. "If no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one."

In summary, we hold that sections 60 and 69 are not only too vague and uncertain to be enforceable regulations of a fundamental right, but that they violate the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups.<sup>111</sup>

*Perez* is notable for two reasons. First, by resting its decision on the U.S. Constitution, the California Supreme Court challenged the authority of the U.S. Supreme Court, and the State of California wisely gave the High Court no opportunity to review the decision. Though Chief Justice Traynor's majority opinion was discretely respectful of the U.S. Supreme Court's authority, it took great pains to point out that its finding of a constitutional "right to marry" was based on *federal*, not state, substantive due-process principles.<sup>112</sup>

Second, the concurring opinions of Justices Carter and Edmonds were not so respectful. They attacked the U.S. Supreme Court's holdings in *Dred Scott* and *Plessy* on explicitly *religious* grounds. Relying on The Declaration of Independence, the United Nations Charter, Abraham Lincoln, Cedric Dover, Thomas Jefferson, and the

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111. *Perez*, 198 P.2d at 29 (citation omitted).

112. The *Perez* court quoted *Meyer v. Nebraska*, 262 U.S. 390 (1923), for the proposition that the Due Process Clause of the Fourteenth Amendment,

[w]ithout doubt, . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Perez*, 198 P.2d at 18-19 (quoting *Meyer*, 262 U.S. at 399).

The *Perez* court relied on *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), for the proposition that "No law within the broad areas of state interest may be unreasonably discriminatory or arbitrary." *Perez*, 198 P.2d at 19. The court also quoted *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942): "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Perez*, 198 P.2d at 19.

Apostle Paul, Justice Carter delivered a broadside against the Court's record from *Dred Scott* forward.

In the years following the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, many courts still did not think that there was real equality among men despite the fact that the language of the amendments is quite clear. Another round of the vicious circle was begun, this time by limiting as far as possible the language of the amendments. Many cases might be cited to support this view, but the hardest blow to liberal minded persons—the biggest step backwards into days of slavery—was the decision in *Plessy v. Ferguson*.<sup>113</sup>

Justice Edmonds, who cast the all-important, fourth (and deciding) vote in *Perez*, went even further in his reliance on the religious arguments, which Daniel Marshall had presented.

I agree with the conclusion that marriage is “something more than a civil contract subject to regulation by the State; it is a fundamental right of free men.” Moreover, it is grounded in the fundamental principles of Christianity. The right to marry, therefore, is protected by the constitutional guarantee of religious freedom, and I place my concurrence in the judgment upon a broader ground than that the challenged statutes are discriminatory and irrational.<sup>114</sup>

### 3. *The Supreme Court of the United States on race—from Dred Scott to Plessy, Brown, and Loving*

Examination of the Supreme Court's opinions on both race and marriage confirms that the ghost of *Plessy* haunts its jurisprudence on both race and marriage to this day. Students are often surprised to learn that the phrase “*Plessy* is overruled” does not appear in *any* of the Supreme Court's opinions. Though the Court has asserted that it “repudiated” and “overruled”<sup>115</sup> *Plessy* in *Brown*, its words—and

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113. *Perez*, 198 P.2d at 31 (Carter, J., concurring) (citation omitted).

114. *Id.* at 34 (Edmonds, J., concurring).

115. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 862–63 (1992) (“[T]his understanding of the facts [in *Plessy*] and the rule it was stated to justify were repudiated in *Brown v. Board of Education*.” (citation omitted)); *Milliken v. Bradley*, 418 U.S. 717, 767 (1974) (“[W]e would be opening a way to nullify *Brown v. Board of Education* which overruled *Plessy* . . .” (quoting *Bradley v. Milliken*, 484 F.2d 215, 249 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974))); *Gomperts v. Chase*, 404 U.S. 1237, 1240 (Douglas, Circuit Justice 1971) (noting that “*Plessy v. Ferguson* has not yet been overruled on its mandate that separate facilities be equal”).

hence its decision in *Loving v. Virginia*—bespeak an approach designed to maintain and extend its asserted power to serve as the branch of government that reflects the mores and political sensibilities of “the thoughtful part of the Nation,”<sup>116</sup> rather than its assigned role under Article III. That role is to serve as the ultimate guarantor of individual political equality under a written constitution and laws that *expressly* forbid the use of race as a legal construct abridging the rights of citizens.<sup>117</sup>

Unlike the California Supreme Court in *Perez*, the U.S. Supreme Court was not compelled to follow federal precedent. In *Loving*, the Court faced a stark choice: The first option was to invalidate Virginia’s anti-miscegenation law as a forbidden racial classification that violated both the Constitution *and* the guarantee of the right to make and enforce contracts embodied in the Civil Rights Act of 1866. That approach, however, would actually have overruled *Plessy*, which also (and not incidentally) involved the right to make a contract. The second option was to use a due-process rationale that would preserve the power it claimed in *Plessy* to strike balances between the rights of equal citizenship and the opinions of “the thoughtful part of the Nation.” The Court chose the latter.<sup>118</sup> In doing so, the Court extended its claim of judicial supremacy into the field of family law.<sup>119</sup>

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116. *Planned Parenthood of Se. Pa.*, 505 U.S. at 864. Justices O’Connor, Kennedy, and Souter explained:

*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court’s response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. *As the decisions were thus comprehensible they were also defensible*, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. *In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court’s constitutional duty.*

*Id.* at 863–64 (emphasis added)

117. U.S. CONST. amend. XV, §1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”). Even as these words are written, the Court has yet to repudiate its claim that the power of judicial review confers *on the Court alone* the power to approve—or disapprove—the use of race as an organizing principle for government action. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

118. Though all the Justices agreed that Virginia’s statute was unconstitutional, they disagreed on two key points: (1) which constitutional norms were applicable under the circumstances; and (2) the appropriate formulation of the rule(s) of decision. Justice Stewart’s concur-

#### IV. DOES THE CONSTITUTION REQUIRE COMMUNAL OR INDIVIDUAL AFFIRMATION OF SAME-SEX RELATIONSHIPS?

When the San Francisco Board of Supervisors condemned the Catholic Church for its view that it is best for children if they are raised in stable, heterosexual households,<sup>120</sup> it described that position

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ring opinion in *Loving* is both short and to the point. Since the words of the statute “ma[de] the criminality of an act depend upon the race of the actor,” Justice Stewart classified the cause of action as a race-based equal-protection claim. *Loving v. Virginia*, 388 U.S. 1, 13 (1967) (Stewart, J., concurring in the judgment) (internal quotation mark omitted).

We will never know precisely why the Court chose to address a “right to marry” in *Loving*, but the answer appears to reside the ongoing debate within the Court concerning the appropriate standard of review in race-discrimination cases. The majority in *Loving* was unwilling to hold that the Equal Protection Clause operates as a categorical negative on race-based laws. Following the approach it adopted in *Plessy*, and later reaffirmed in both *Brown I* and *Brown II*, the majority opinion by Chief Justice Warren held that Virginia had failed to sustain its “very heavy burden of justification,” *Id.* at 9 (majority opinion), because there was “patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.” *Id.* at 11.

Justice Stewart’s concurring opinion in *Loving* took a dim view of the Court’s “balancing” approach. Adopting the rationale of his concurring opinion in *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964), Justice Stewart castigated the majority for attempting to maintain flexibility on the permissibility of race discrimination when, in his view, the Constitution prescribes a categorical rule.

I concur in the judgment and agree with most of what is said in the Court’s opinion. But the Court implies that a criminal law of the kind here involved might be constitutionally valid if a State could show “some overriding statutory purpose.” This is an implication in which I cannot join, because I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person’s skin the test of whether his conduct is a criminal offense. . . . And I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious per se.

*Id.*

119. See *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859). See generally Anthony B. Ullman, Comment, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983).

120. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, at para. 5, HOLY SEE, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html) (last accessed May 26, 2013).

Where the government’s policy is *de facto* tolerance and there is no explicit legal recognition of homosexual unions, it is necessary to distinguish carefully the various aspects of the problem. Moral conscience requires that, in every occasion, Christians give witness to the whole moral truth, which is contradicted both by approval of homosexual acts and unjust discrimination against homosexual persons. Therefore, discreet and prudent actions can be effective; these might involve: unmasking the way in which such tolerance might be exploited or used in the service of ideology; stating clearly the immoral nature of these unions; reminding the government of the need to

as “hateful and discriminatory rhetoric” that “is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors.” It further opined, among other things, that “[s]ame-sex couples are just as qualified to be parents as are heterosexual couples.”<sup>121</sup>

This Article is neither the time nor the place to engage this debate. It will suffice, for present purposes, to note that there is *profound* disagreement here. It is simply not possible to validate a charge that the Catholic Church’s official position on a question so fraught with difficulty as the optimal environment for raising children is “hateful,” “insulting and callous,” and “insensitive.” Nor is it possible to quantify (assuming that anyone even made the effort to measure) the relative “level[s] of insensitivity and ignorance . . . encountered by [that particular] Board of Supervisors” in the day-to-day exercise of its official and non-official duties. What is interesting about this exchange is the charge by elected officials of the City and County of San Francisco that the Church’s long-standing position on the relative merits of raising children in stable, heterosexual households is “ignorant.”

If we assume, as we must, that the Board of Supervisors believes that opposition to same-sex marriage and same-sex parenting is both “ignorant” and “hateful,” we are still left with a constitutional conundrum. Does the Constitution require any person or association to affirm a disputed point of religious morality, social theory, or political ideology?

The answer is “No.”

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

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contain the phenomenon within certain limits so as to safeguard public morality and, above all, to avoid exposing young people to erroneous ideas about sexuality and marriage that would deprive them of their necessary defences and contribute to the spread of the phenomenon. Those who would move from tolerance to the legitimization of specific rights for cohabiting homosexual persons need to be reminded that the approval or legalization of evil is something far different from the toleration of evil.

In those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty. One must refrain from any kind of formal cooperation in the enactment or application of such gravely unjust laws and, as far as possible, from material cooperation on the level of their application. In this area, everyone can exercise the right to conscientious objection.

121. Board of Supervisors, City and County of San Francisco, Resolution No. 168-06, *supra*, note 96.

politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>122</sup>

We need not belabor the point, which is well-documented in the literature, that Supreme Court precedent is both clear and consistent: Governments may not compel any individual or group to affirm a message they disagree with.<sup>123</sup> There is also no disagreement about the desire of same-sex-marriage supporters to force political communities to affirm the equal status and legitimacy of their relationships. The California Supreme Court's opinion in the *Marriage Cases* makes this point explicitly.

[F]or a number of reasons we conclude that in the present context, affording same-sex couples access only to the separate institution of domestic partnership, and denying such couples access to the established institution of marriage, properly must be viewed as impinging upon *the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples.*

First, because of the long and celebrated history of the term "marriage" and the widespread understanding that this term describes a union unreservedly approved and favored by the community, there clearly is a considerable and undeniable symbolic importance to this designation. . . .

Second, . . . retaining a distinction in nomenclature . . . inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship. . . .

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122. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

123. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Lee v. Weisman*, 505 U.S. 577 (1992); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15–16 (1986) (plurality opinion); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977); *Buckley v. Valeo*, 424 U.S. 1, 22–23 (1976) (per curiam); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (striking Florida's right-to-reply statute because "[t]he Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter").



Third, it also is significant that although the meaning of the term “marriage” is well understood by the public generally, the status of domestic partnership is not.<sup>124</sup>

The only question here is whether the Equal Protection Clause effectively “repeals” the First Amendment to the extent that a political or private community can be accused of harboring “hateful,” discriminatory, or homophobic tendencies.

The answer to this question is also “No.”

The Constitution respects the political equality of both persons and political communities. The only “permanent” provision of the United States Constitution is the political equality of the states embodied in their equal representation in the Senate.<sup>125</sup> *As communities*, the states have an equal right to self-rule protected by the Full Faith and Credit Clause, and a guarantee that Congress will intervene if the political community deviates for any reason from “a Republican form of Government.”<sup>126</sup> The Establishment Clause is also a guarantee that religious associations are entitled to equal treatment at the hands of the federal government. In sum, the Constitution is built around a series of structural mechanisms that protect the political equality of American citizens, both individually and collectively.

Textual support for the principle of political equality among citizens is found in the following places:

- The Qualifications Clauses of Articles I and II for Members of Congress and the President.
- The Qualifications Clause for Electors in Article I—which was modified by the Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments
- The No Religious Test Clause of Article VI
- The Interstate Privileges & Immunities Clause of Article VI.
- The entire Bill of Rights—particularly the First Amendment, but not ignoring the substantial political-equality components of the Third Amendment and the Takings Clause of the Fifth Amendment

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124. *In re Marriage Cases*, 183 P.3d 384, 445–46 (2008) (emphasis added).

125. U.S. CONST. art. V (“[A]nd that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

126. U.S. CONST. art. IV (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

- The Reconstruction Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments)
- The Voting Rights Amendments (Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments)

While much has been said and written about the Court's somewhat truncated view of political equality—and of the demands it imposes on Congress—in the “Reverse Incorporation Doctrine,” here, we must focus on the meaning of political equality itself. How does it factor into the constitutional law that governs the questions posed in this symposium? *Does the United States Constitution require legal recognition of same-sex marriages?*

#### V. DOES THE ANALOGY TO RACE SUPPORT COMPELLED AFFIRMATION OF SAME-SEX UNIONS?

It finally comes down to this. Does the Constitution require recognition of same-sex marriage because discrimination on the basis of sexual orientation is the functional and moral equivalent of race discrimination?

The answer to this question is an emphatic “No.”

Let us return for a moment to the City and County of San Francisco's broadside against the Roman Catholic Church. Even if we assume that the Church's stated preference for placing children in stable, heterosexual households is “discriminatory” (and the Church concedes as much),<sup>127</sup> we cannot answer the question whether the distinction drawn is unjust without first considering the reasons for the distinction.

If, as both Congress and the majority of the states have concluded, there is a public consensus *against* affirmation of same-sex unions, it is perfectly rational for legislators and voters to refuse to grant that affirmation. The analogy to race adds nothing to the equation because *the concept of race has no natural-rights components*. It is, and always has been, a purely *political* construct.<sup>128</sup>

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127. Congregation for the Doctrine of the Faith, *Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons*, at para. 11, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19920724\\_homosexual-persons\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19920724_homosexual-persons_en.html) (last visited May 26, 2013) (“There are areas in which it is not unjust discrimination to take sexual orientation into account, for example, in the placement of children for adoption or foster care . . .”).

128. See, e.g., *Perez v. Lippold*, 198 P.2d 17, 27 (Cal. 1948). Before the voyages of Co-

And thus we return to the problem of compelled affirmation. The *only* way that discrimination on the basis of sexual orientation can be the (im)moral equivalent of discrimination on the basis of race is if the concept of “sexual orientation” is, like race, a purely *political* construct.

But not even the most ardent advocates of “Queer Theory” accept that.

If defined in scientific terms, “sexual orientation” is emphatically *not* a social or political construct. If defined as “refer[ring] to one’s pattern of erotic responsiveness . . . *androphilic* (attracted to men), *gynephilic* (attracted to women), or *bisexual* (attracted to both),”<sup>129</sup> it describes real, and (sometimes) measurable physical phenomena.<sup>130</sup> Nor is “sex” a social or political construct if (and only if) it is used to “refer to the biological variables that can be described as either male or female (e.g., genes, chromosomes, gonads, internal and external genital structures).”<sup>131</sup>

The issues being debated in the same-sex-marriage cases are thus rooted in real and substantial differences of opinion on the meaning of human nature and the relevance of a whole host of disputed scientific terms, social phenomena, research efforts, and empirical data. Also in debate are the meaning and utility (both individual and social) of hotly contested social categories, like LGBT (and all of its vari-

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lumbus, the concept of race was used to distinguish among Christians, Jews, and Pagans (*i.e.* the “Christian race” or the “Pagan races”). The race-as-color concept developed in the early 1500s when British and Dutch slave traders, condemned on religious grounds by the Vatican, developed a post hoc Biblical defense for their actions. One justification was that “the Negro was a heathen and a barbarian, an outcast among the peoples of the earth, a descendant of Noah’s son Ham, cursed by God himself and doomed to be a servant forever” because of the sin of looking upon his father’s nakedness. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 12 (1978) (internal quotation mark omitted); *accord* D. Marvin Jones, “*We’re All Stuck Here for a While*”: *Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35, 72–73 (1998). See generally 6 *THE BIBLICAL AND “SCIENTIFIC” DEFENSE OF SLAVERY: RELIGION AND “THE NEGRO PROBLEM”* (John David Smith ed., 1993).

In California, as in other states, the concept of race simply became a shorthand means for describing “a distinct people [Chinese], living in our community, . . . differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference.” *People v. Hall*, 4 Cal. 399, 404–05 (1854) (holding that the phrase “No Black, or Mulatto person, or Indian” included “all races other than the Caucasian”).

129. Byne, *supra* note 33, at 950.

130. See Chivers et al., *supra* note 33.

131. Byne, *supra* note 33, at 950.

ants), "straight," "homosexual," "gender," "gender identity," "sexual preference," and "gender role."

There is a disagreement here. The Equal Protection Clause provides no authority for the U.S. Supreme Court to resolve it as a matter of constitutional law.

## VI. CONCLUSION

The same-sex-marriage cases *invite* the courts to cut off a political debate over the wisdom of communal affirmation of same-sex and alternative intimate relationships that grows more robust by the hour. If the Court accepts the invitation of the lower courts to require Congress and the states to affirm the proposition that all (or nearly all) forms of intimate relationships are entitled to the same communal affirmation as monogamous, conjugal relations between a man and a woman, the cost will be another round of bitter litigation over the meaning of political equality.

It may seem obvious, but the point bears repeating: All parties to the debate over same-sex marriage are natural persons (or associations of natural persons) who have equal rights to express their views and to seek redress of their respective grievances. It makes no difference for constitutional purposes whether those grievances are directed against state laws defining marriage as the monogamous relationship of one man and one woman (as in the *Marriage Cases* and the lawsuits against the Defense of Marriage Act), or if they are directed against the decision of a state supreme court that seeks to remove the issue from the political process (as in the case of Proposition 8 or the Hawaii constitutional amendment overturning *Baehr v. Lewin*). All parties to the debate have an equal right to participate, to influence representatives, to "count noses," and to prevail if they can muster the votes to do so.

But there are two things they cannot do in this debate among the People concerning the wisdom and morality of defining "marriage" as the union of one man and one woman. The first is to have any level of government cut off the debate by declaring that their opponents are the functional equivalent of ignorant racists whose speech and associational rights can be limited because of the content or perspective of their speech or expressive conduct. The second is to compel affirmation of any idea, relationship, or status unless it is recognized in the text of the Constitution itself.

Writing for the Court in *Zorach v. Clauson*, Justice William O. Douglas observed:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.<sup>132</sup>

Justice Douglas's point is profound. The Constitution *requires* that our government, including the President, the Court, the Congress, and the states, "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." Simply stated, this means that our government must take us—citizens, guests resident in our country, and people of other countries—as *it finds us*.

If the structure of "heteronormativity" is to be dismantled, there is only one place to do it: at the ballot box.

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132. *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952).

*Symposium on Whether  
Legalization of Same-Sex Marriage  
Is Constitutionally Required—2012*

III.

INTERNATIONAL AND  
COMPARATIVE PERSPECTIVES ON  
CONSTITUTIONAL MANDATES FOR  
SAME-SEX MARRIAGE

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